No. 12,393

IN THE

United States Court of Appeals

For the Ninth Circuit

COLUMBIA LUMBER COMPANY, INC. (a corporation),

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-partners doing business under the firm name and style of Barry Arm Camp,

Appellees.

Upon Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF FOR APPELLEES.

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STATEMENT OF FACTS.

Appellees will now endeavor to make a brief but clear statement of facts developed by the evidence, and at the same time considering the fact that the principal assignment of error is insufficiency of evidence to sustain the verdict of the jury, and the judgment of the Court, we are sorry that we can't agree with the statement of facts set forth in appellant's brief, for in many instances very material matters

are completely left out, and in some instances the statement is more of a conclusion of the appellant, than the actual facts established by the evidence, or possibly that which appellant is unconsciously thinking, should be the facts. This action, as shown by the amended complaint, was set up in three causes of action, as is shown by the transcript of record, page two, and to this amended complaint, an answer was filed (Tr. 8); then a second amended complaint was filed by direction of the Court on June 2, 1949 (Tr. 12); to this second amended complaint, a long answer was filed as is shown by the record, page 18. The issues were joined by the reply filed. (Tr. 37.)

Bruno Agostino, one of the plaintiffs, was first called as a witness, and testified, that he was seventy-one years old; lived in Anchorage since 1916, except the years of 1944, 1945, 1946, and 1947, at which time he was engaged in a logging business with the other plaintiff at Barry Arm. Plaintiffs had built several buildings there, including cook house, bunk house, and garage, some of which were modern in every way. One was a 24′x30′, two-story building; that plaintiffs owned a D-8 caterpillar, a donkey engine, 2400 feet of cable, necessary blocks, a sawmill, and much other property described in the Tr. 113 to 119. That the camp was equipped for a crew of twelve men; they had plenty of trap logs; the piling was in; they had established a log pond by setting piling and chaining floating logs between; that in October 1947, he and his partner had purchased from the Government, a right to cut 250,000 board feet of logs, and had paid

by check for the permit. This being the third or fourth permit that had been issued to them. That the permit was issued in October, too late to cut timber in the fall, but plaintiffs were prepared to cut this timber in the spring of 1948. (Please note original check in the sum of two hundred fifty dollars ($250.00) as an exhibit). That they had two other permits before the issuance of this one; that they had cut the timber evidenced thereby, and the two hundred fifty dollars ($250.00) check was an advance payment for 250,000 board feet that plaintiffs were permitted to cut in 1948.

He further testified that in March, a Mr. Lambert appeared at the mouth of Mosquito Creek with machinery and a scow; that Mr. Lambert (superintendent of the logging camp for Columbia Lumber Company, Inc.) wanted to land there in the midst of the plaintiffs' operations. That a conversation took place in which Mr. Agostino told Mr. Lambert that he couldn't land there; that if he let him land there, it would stop and block the plaintiffs, and they couldn't operate. That Mr. Lambert then went away and came back a week later. Then, the witness described plaintiffs' operations at the mouth of Mosquito Creek as follows: Mosquito Creek was a small stream, too small for two outfits, only large enough for one; that one outfit operating by putting logs in the channel, and refting, was all that could work there. That in low tide, Mosquito Creek was about 18′—20′ wide, and in high tide, 20′ of water in the channel, 10′ on the sides of the channel. That plaintiffs had a boom in there

made of logs chained together across Mosquito Creek, and had made what they called a log pond. That pilings were set or driven and boom logs and chains fastened between them. Plaintiffs had operated that way since they went in there.

That their boom logs closed the mouth of Mosquito Creek, and no one could get in and out with a boat, only room enough for one boom, or one raft. That plaintiffs had had three Government permits prior to this one referred to and had taken out 750,000 feet, board measure of logs. A map was identified and introduced, as Exhibit 2. This map showed plaintiffs' buildings and improvements, the logging woods that had been cut over, and the tract that had been purchased to cut. He then explained the various buildings, the log pond, and all parts of the map, see Tr. 125, 126 and 127. It also showed the saw mill, the logging roads built by the plaintiffs with their D-8 caterpillar. Mr. Lambert was shown the roads and everything. Mr. Lambert and Ted Rowell came back a few days later in a boat, some of the men stayed in the boat, and Ted Rowell and Kenneth D. Lambert came ashore; they had a conversation; they showed him a letter from the Columbia Lumber Company to move into the pond; also a telegram from Juneau. Bruno Agostino told them they could not land. Mr. Lambert had the telegram. It was from Mr. Morgan. Lambert showed Mr. Agostino the telegram, Agostino read it and gave it back to Lambert; Agostino offered to sell out to Columbia for $25,000.00; Lambert went to call Mr. Morgan on the long distance telephone

about buying Agostino out; Mr. Lambert came back about March 21, or 24th, in a boat. A Mr. Griffen or Cliffend also came. Ted Rowell came. They came in a small boat powered by a gasoline engine, used to pull rafts. The boat was working for the Columbia Lumber Company. Mr. Lambert and Mr. Ted Rowell told Mr. Agostino that Mr. Morgan would come on the 10th of April and settle with him. The price of $25,000.00 was again discussed. Agostino again told them his price was $25,000.00, $19,000.00 for the machinery and $6,000.00 for the rest of the buildings, cable and things that were there, including the blocks and all material. That he, Agostino, was familiar with the value of the equipment at this time; that they paid $25,000.00 for the equipment and machinery, offered to sell it for the same amount, $25,000.00. Mr. Ted Rowell said that he spoke to Mr. Morgan on long distance, and told Mr. Morgan what Agostino's price was. That Mr. Rowell said that Mr. Morgan told him to go ahead, said Mr. Morgan was going to be up on the 10th of April and settle with Agostino. Mr. Morgan came on the 10th of April, gave orders to start the cats, and "see how they go", and promised to come back in two days and settle with Mr. Agostino. That Morgan never did return, he never paid anything; never paid a red penny. When Mr. Morgan said he would come back in two days and settle, Agostino told Morgan, Lambert and Rowell that they had full possession to Columbia Lumber Company. He let the scows land. He told them to use all his machinery, his bunk houses, everything, and his timber. They

straightened up his machinery, went into Agostino's garage, and got whatever they needed, back and forth, for pretty near a month. Then they went through his pond to cut the timber down. They were there about a month before they actually started cutting timber. When they started cutting timber, Agostino came to Anchorage. They cut his timber first. They promised to come in and pay, and he never did see Mr. Morgan, he went and employed Mr. Butcher, nothing has been settled so far; never received a red penny. He and Mr. Butcher went back to the place; took an airplane and landed there; took pictures. Agostino's timber was all cut down, his pond was being used. They had possession of everything; Agostino gave them possession. Then he identified many pictures. (Tr. 136-159, incl.) Starting on page 160 Tr., Agostino describes the log pond as being a little lake where they stored the logs, surrounded by what is called a boom, made of logs tied together at each end with a chain or cable, put through a hole in the end of the log. They had piling in there, the logs fastened between the pilings. All boom logs equipped that way. Plaintiffs drove the piling. Agostino and Mr. Socha drove them. There were about thirty of them. They were hemlock pilings, about 15 feet long. They pulled the logs into the pond with a cat. The pond was 1,000 feet from the bunk house on the east side. He had a conversation with Blackie Lambert and Ted Rowell about March 24 while sitting in a little cabin about 500 feet from the main camp where he was living at the time, about five o'clock p.m. The first trip they came was about March 20, that was in the morning. They had a

conversation, went away, they came back later, about 24. That conversation was when they made the deal, the camp was turned over to them. The possession was given to them.

They then came in with the scow, boat, and machinery, the whole outfit. They were going to pay me my price, $25,000.00—$19,000.00 for the machinery, $6,000.00 for the rest of the stuff. He went and called Mr. Morgan, came back to me and say, "Mr. Morgan will come up on the 12th of April and settle with me". Mr. Morgan did come on the 10th of April, give orders to start the machinery. Mr. Lambert started the machinery, Morgan never came back. (Tr. 165-166.) He then testified that he had given them a price, they went away to talk to Mr. Morgan and came back and told him that Mr. Morgan said it was all okeh. They went back to Whittier and then back to Barry Arm. They came back and said everything was all right, that they would go to Hobo Bay and get the outfit and Agostino said okeh, you have got the full possession. They came back with the outfit, in five or six hours. (Tr. 167.) The place occupied by the plaintiffs was the only place that the defendant could enter to take out the timber on upper Mosquito Creek, and Mosquito Creek was not large enough for two logging companies to operate on. When one company was operating, the other could not, one company completely closed the waters. (Tr. 168.) Agostino waited a month for Morgan to come back and pay off. They landed the scows, fixed the machinery and waited for the snow to go away, then moved in back of the pond.

They didn't start using the bunk house and camp house until Mr. Lambert came out and a new foreman came in, then they took everything over, Mr. Lambert was running the camp, the logging for the Columbia Lumber Co., he was director of the camp. Agostino went back there about the 29th or 30th of August, stayed until September 2, stayed in the little cabin back of the camp, his old prospecting cabin, small cabin, 10x12 feet. He didn't interfere with the camp at all. The machinery started operating about the 11th of July, 1948. They started moving the machinery then, using the oil, using the gas, using the bunk house, a barrel and one-half of gas, six barrels of diesel oil. They were operating back of the pond. (Tr. 171-172.) July 11, 1948, they moved up to their new camp. Agostino testified that his cats were being used when he was there. He took a lot of pictures of the machinery working up to their camp. They are the small pictures identified the day before. That was about August 30, 1948.

And, on cross-examination by Mr. Boochever, he testified:

Mr. Grasser sold his interest to Agostino and Socha, who were the sole owners of the camp. Grasser withdrew, a settlement was made, an oral contract. He was paid $1,700.00 by a check. He has not been back to the camp since September. The D-7 cat cost $5,000.00 and the donkey, $4,000.00. He stated that he did not know whether any of the property had been taken away or not. (Tr. 174-175.) He considered the other cat paid for in 1945. (Tr. 176, 177 and 178.)

He further testified that he told Mr. Lambert in March that Grasser claimed the tractor and the donkey, but Grasser did not own them. That he had three different timber contracts. One block that had never been touched; four blocks altogether; three had been logged over, one never touched. The last one already cut off by Mr. Morgan's order. He said he told no one that he was not going to do more logging. Then the application for modification of an agreement dated June 23, 1945 was introduced in evidence by the defendant. (Tr. 181-182.) It was turned over to the Forestry Service about the 10th of July, 1948. The modification agreement was made after the timber had already been cut. The witness paid $250.00 on October 31st for another 250,000 feet, the check was cashed, introduced into evidence. Agostino said he had stayed at the camp all during the winter prior to March 1948. He told Mr. Lambert not to land there because it would interfere with his operations. He had no gun, didn't threaten to shoot him, didn't threaten to shoot anybody. Lambert came back. He didn't permit him to land then because he told Lambert he would interfere with him, from logging here in the pond at the time. He told Lambert he couldn't land there. He then went back, he said maybe the company would want to buy me out, if they did, they could pay my price. Mr. Lambert said he would talk to Mr. Morgan and then come back again. Mr. Lambert came back a second time. The witness told Mr. Lambert he would sell for $25,000.00 at that time. He said he would go back and see Mr. Morgan again, he owned the right to use the land, and one permit

at the time, besides the equipment. He paid the Government to use the land, he had the right to cut the timber and travel all over that land and hold the land, the right to have the channel for his own use, why should another fellow come in there, and block him out. " 'If you go to cut log timber, you have to get a permit from the land office of the United States.' " He did that. The Government gave him the right to cut the timber and sell it. He had a bunk house, a cook house, machinery, and etc.—a D-8 caterpillar, a D-7 caterpillar, a diesel engine about 95 H.P., a donkey, lots of stuff, blocks, cable, $15,000.00 worth of stuff lying there, besides the machinery. Mr. Lambert and Mr. Rowell came back March 24, at that time they told him that they had had a talk with Mr. Morgan, eight minutes long distance, and he told all that he said. He gave possession to Mr. Lambert, turned the pond and everything over to him, gave him possession, turned over everything. Told him, I stay in the little cabin, that prospecting cabin five hundred yards from the bunk house. He landed and took possession of the camp, cut the witness' timber. He took possession of the main camp. He went in the garage, got pipe wrenches and everything he wanted with the exception of taking the machinery out. They used the other stuff. They went in the buildings. They used the building for a warehouse. Kept stuff in there out of the rain. Didn't use the cats at that time. Didn't sleep in the buildings then. They walked across, they went in the bunk house, they went in the machine shop got what they wanted and would go back in again when they want to, never ask permis-

sion. He told them that it belonged to the Columbia Lumber Company when he give them possession. That was their property. One month later, they set up a camp across the pond, they first just landed at his cabin, stay there until they moved, lived in the small house on the scow. They fixed their own machinery. On April 10, Mr. Morgan came, talked to the witness, property had already been sold to him for $25,000.00. He said start the cats and I will come back in two days and we will make a settlement. (Tr. 190-191.) He never came back any more. Mr. Morgan told him he was buying the property on April 10th. Was going away and would be back in two days and settle with him. He agreed to buy it. "He said he come back in two days and settle with me." (Tr. 192.) The witness stated that he stayed in the little cabin waited for the gentlemen to come back, and he never came back and later he went into town; that was later in May, went to see a lawyer, Mr. Butcher. They got a plane and went back in June. The Columbia Lumber Company had its camp set up about one-half a mile up the creek, still on his property, on the edge of the pond, working his permit. They set their camp up at the edge of the pond. He and Mr. Butcher came back to town together. Mr. Butcher called Mr. Morgan on the phone. Morgan came up about the end of June. He sent a telegram but Mr. Morgan never came around. He thinks he came up in July. A contract was drawn, Agostino signed it, but Morgan didn't then. The contract was introduced in evidence as Exhibit "B". (Tr. 196.) The contract was dated July

29, should have been June 29. He signed it June 29th. The contract was sent to Mr. Morgan for his signature. Mr. Morgan never signed the contract. (Tr. 202.) After that he went back to Barry Arm again in August. "The defendant was using the cats". had taken them over to their camp July 10th or 11th. The employees of the Columbia Lumber Co. were living in witnesses camp, the old camp; Mr. Morgan himself was there, Mr. Hooper and Mrs. Hooper, and a few of the fellows. He saw them there the 30th of August. Hooper said Mr. Morgan gave him authority to stay right there. The witness stayed in his little cabin two days and then came to Anchorage. He went there because his pots and clothing were in the little cabin and the company did not want the cabin. When he was there, the cats were being used, he saw the D-7 dragging logs.

On redirect examination, he testified:

That he had Mr. Butcher call Mr. Morgan to come up and settle, but he never came. The witness was not in Anchorage in July. He had no knowledge that Thomas Morgan ever signed the contract. He never came near the witness. He never knew before today that Morgan had signed the contract. He then examined *his copy* of the contract, stated that Morgan never signed it. One is marked July 5th, the other July 29th. This was the only copy he was ever given. It was never signed by Mr. Morgan. That is the only thing he ever had. The matter was then called to the attention of the Court that there was no pleading by

the defendant indicating the contract was ever signed. The witness then testified that he was at Butcher's office, Mr. Morgan stepped in just two minutes, made a compromise offer of $10,000.00, Mr. Butcher drew the contract, gave it to the witness to sign, the witness said when will Mr. Morgan sign it, Butcher said we would send it to Juneau, the witness signed the contract, it was sent to Juneau, he waited one month, the contract never came back, was never signed by Mr. Thomas Morgan and he went to Whittier on the 10th of July, he met Mr. Morgan, asked him if he was going to sign the contract, he said yes, but never did. He met him again in the Barry Arm, asked him about the contract he said come to town and I will give you the money. The witness came to town and never saw the gentlemen, and the contract not signed either. He never knew Morgan signed it, and in late September he met Morgan, told Butcher the contract is out, I will have nothing to do with it because he never paid one cent, and he never signed the contract, and he then started this suit. (Tr. 212-213.) No one had ever paid the witness a red penny. He never saw Mr. Morgan thereafter, until in Court now. He got Mr. Bell and Mr. Ross to start suit against Mr. Morgan for his money. He signed the $10,000.00 compromise settlement to avoid trouble, but Morgan did not sign the compromise contract at all.

Further on redirect, it was stipulated that no money had ever been paid into the office of the Court Clerk for the plaintiffs.

Then Kenneth D. Lambert was called by the plaintiff and testified to his name, and to his nickname of "Blackie". Stated that during the fall of 1947 he made a timber cruise for the Columbia Lumber Company with Mr. Rowell, and made a report to the Columbia Lumber Co. when he returned. He was employed to make the trip by Mr. George Morgan of the Columbia Lumber Company. One of the places he went to was Barry Arm. Went up Mosquito Creek three or three and one-half miles. Identified a report made at that time. Mr. Morgan had the report typed. The girl in the Columbia Lumber Company office typed it, in the office at Whittier. The witness was given a copy of the report. He left Whittier to make the trip, he went by boat, left the boat parked in front of Mr. Agostino's house in the bay. Went afoot from there, about three and one-half miles. Made a general survey of the timber that could be reached for logging in that area. Next saw Barry Arm Camp in the spring, at which time he was working for the Columbia Lumber Company in the capacity of a foreman, more or less. Went there to see if there was any ice in the river and to see if they could take equipment in. Saw Mr. Agostino, had a conversation with him. Mr. Agostino informed them that they couldn't move the equipment in. That he had a timber sale in there and prior rights thereto. Talked possibly an hour. Nothing was said about buying Agostino out in that conversation. Left and went to Whittier, reported to Ted Rowell, the mill superintendent for the Columbia Lumber Company, the defendant in this

action. Told Mr. Rowell what took place. Then testified that they called Mr. Morgan in Juneau, explained the situation to him. He said Mr. Agostino had no rights to the timber whatsoever, that they had bought all of the rights, and that they were to go ahead and move in. They then went back and talked to Mr. Agostino again at Barry Arm, near the camp. That was possibly a week after the first trip, around the 20th of March, or maybe the 15th. Mr. Rowell, the foreman or superintendent for the mill of the Columbia Lumber Company was with him. There was a conversation. Mr. Agostino said they couldn't move in until some provision was made for buying him out. He showed us a telegram he had received from the Forestry Service. He gave us the telegram to take back. I gave the telegram to Mr. Rowell, he has it in his possession. It was a telegram from the Juneau office that he had a continuation of his timber sale of 250,000 bd. feet. They then went back to Whittier, communicated again with Mr. Morgan. There was a price mentioned. Mr. Agostino wanted $19,000.00 for his equipment, plus $6,000.00 for his buildings. He gave the information to Mr. Morgan. He had a telephone conversation with him. They both talked to Mr. Morgan, he and Mr. Rowell. The witness was well acquainted with Mr. Morgan, knew his voice. We told Mr. Morgan of the condition, that there was a camp, that Mr. Agostino didn't want us in there, and I think we mentioned the price to Mr. Morgan over the phone at the time. Mr. Morgan said if he wouldn't let us move in and there was indication of any trouble

like that, to have him put off. To get the marshal and have him put off, if it was necessary. Later Mr. Morgan sent a telegram that he would be up and make some kind of arrangements with Mr. Agostino. That was supposed to be sometime around the 10th of April. I think Mr. Ted Rowell went back with me. We had a conversation with Mr. Agostino. It was possibly around the 25th of March. We showed him the telegram that Mr. Morgan would be up and make some kind of a settlement with him. The price was not mentioned in the telegram. The only price I ever knew was $19,000.00 for the machinery and equipment and $6,000.00 for the buildings. The witness made the fourth trip in. In the meantime Ted Rowell had tried to get the United States marshal to dispossess Mr. Agostino. The marshal did not do it. (Tr. 226-227.) The marshal never went there. The witness then called Mr. Morgan in Juneau, called him or sent him a wire, he couldn't remember. Informed Mr. Morgan that Agostino refused to move. Morgan said he would come up and settle, make some settlement with Mr. Agostino. The witness went back with Mr. Ted Rowell, told Mr. Agostino of the conversation. That was in the latter part of March. The witness testified that we informed Mr. Agostino that Mr. Morgan would be up and make settlement with him. Mr. Agostino said, "Go ahead and move in, he would give us free access to the camp and the ground, and everything". He stated we could have possession of all of the premises if Mr. Morgan was coming up to make a settlement with him. We then took possession. We were acting for the Columbia Lumber Company, were

regularly paid employees of the Columbia Lumber Company, at that time. They then unloaded the bunk house and started falling timber, getting ready to log. Stayed there until July. Terminated his logging contract with the Columbia Lumber Company on the 14th of July, cut no more timber there. Left the Columbia Lumber Company at that time. In February he had signed a contract with the Columbia Lumber Company to start cutting timber the 15th of April. Agostino stayed there about a week or two. He stayed in his own little cabin, in the close proximity. He started the cats up to inspect them to see what kind of condition they were in, and that was all he used them, was there on the 10th of April when Mr. Morgan came. Mr. Agostino offered the equipment to Morgan for $19,000.00, and $6,000.00 for the buildings. Mr. Morgan said he thought the price was too high. Mr. Morgan then tried to rent the property for $300.00 per month. Agostino wouldn't rent it. There was a conversation then about starting the cats and seeing how the equipment would work. Mr. Morgan then issued the order. The witness started the cats up to see what condition they were in. Listed all the parts that would put them back in first class shape. Gave an estimate of $10,000.00 for the repair of the two cats, that would put them back in excellent condition. The cast would cost originally $18,000.00 for the D-8, and $16,000.00 for the D-7, the donkey engine around $6,000.00. There were blocks and lines there, of the reasonable value of $1,200.00. The donkey engine was worth $5,000.00, or possibly $4,500.00. There was a big sled on which it was mounted. He testified

he had been in the logging business twenty years, all during which time he had operated logging equipment and machinery similar to that at Barry Arm, was familiar with the value of the equipment, like the equipment had there by the plaintiffs in this case. That the reasonable value of the sled on which the donkey engine was set would be six to eight hundred dollars. It was in good condition. The two cats would be of the reasonable market value of approximately $5,000.00 apiece. Would hesitate to set the value of the sawmill; the tools, drill press, vice and anvil and miscellaneous tools would be worth around $1,000.00, there were around twenty boom logs with chains. The chains were worth $7.00 apiece. The logs would be worth the scale thereof, around 700 feet to the log. Worth $21.00 a thousand. He observed the roads, there were three or four of them. The cost of roads would be around $100.00 a station, approximately $1.00 a foot. The bunk house had some mattresses and springs, 250,000 feet board measure of logs would be worth, the trap logs would be worth around $45.00 a thousand, or $21.00 a thousand for the ordinary logs in the water. There was an electric light plant there; a battery charger; some diesel oil and gasoline, those were used. He never had any obstruction from Agostino in any way after he landed. We were free to go upon the premises at any time and use anything we wanted to use.

Then the lumber cruise report was introduced in evidence and read. (Tr. 242.) The timber was good. There was no way for two outfits to work without

one blocking the other. It had to be one exclusive operation. The pond was used by him. It was a body of water staked with piling, all the way around, a place to raft logs, eight feet of water in high tide, was good rafting ground. He put the logs in the pond with the cat, then rafted them in a boom. That was done for the Columbia Lumber Company who took the logs away. The Columbia Lumber Company had made a timber purchase further up Mosquito Creek, prior to their landing. It was around three miles up. Mosquito Creek is not a navigable stream. He started logging at the edge of the ground which had been logged by the Barry Arm people. It was a continuous operation.

On cross-examination, he testified:

That he went up to Barry Arm in March 1948, was working for wages for the Columbia Lumber Company at the time, was on the company payroll, was paid wages by the company.

A written contract was then introduced in evidence as Exhibit "D". (Tr. 249.) He was to start producing as of April 15th. He went there for the purpose of moving in the camp from Hobo Barry to Barry Arm. The camp and the A-frame were about to sink. They were covered with ice and snow. He was sent there to get them out. He moved them. That he delivered Mr. Morgan's message to Mr. Agostino to the effect, that Mr. Morgan would be up on the 10th of the month to make some necessary provisions or arrangements for the purchase of his equipment. Then Mr. Morgan came up around the 10th of April. Mr. Agos-

tino demanded one-third down. The cats were then inspected. The Columbia Lumber Company had one cat. The camp was landed in the end of the pond, the roads were used. (Tr. 256.) Mr. Rowell tried to get the marshal to come out and evict Mr. Agostino.

On redirect examination he testified:

That he received wages for the month of March from the Columbia Lumber Company as an employee, identified voucher detached from his check. This was accepted in evidence. At which time he was engaged in the business of the Columbia Lumber Company. (Tr. 261.) It was his impression all the time that the Columbia Lumber Company had bought Mr. Socha and Mr. Agostino out. (Tr. 261.) He started falling timber on April 6. His agreement provided for two cats and the Columbia Lumber Company only furnished one. He recommended a D-8 cat, the company furnished only a D-7.

Stanley Socha was then called and stated he was a partner with Bruno Agostino in the operations at Barry Arm Camp. He helped build the camp. Originally the pond was filled up with log stumps. They cleaned it up; it took from September until the snow left the ground to clear up the pond and build some roads; they used a cat all the time. It took four men, rough estimate, October, November, December, January, February, and March, around six or seven months' work to build the roads and the pond. They had no pile driver, so they dug holes with a shovel on low tide when the pond was dry, and put in the pilings, two rows about two feet apart, clear across the pond, and

had floating logs, so that they could rise up and down. He had given Mr. Agostino his consent to sell the Barry Arm Camp to the Columbia Lumber Company. He and Mr. Agostino were the owners.

The defendant then called E. M. Jacobsen to testify. He was supervisor for the Forestry Service. He testified that the Columbia Lumber Company did have a permit to cut timber there in the Barry Arm area, and on cross-examination, that he knew Agostino; that he had been cutting timber there since 1944, or possibly 1945, -44, or -43, was the first sale made. He identified his signature on a paper, which was "a right to cut timber", or a modification of the original timber sale and extension, to December 31, 1948, and Agostino had a perfect right to cut the timber until December 31, 1948. He never took his big boat in the mouth of Mosquito Creek, always went in there with a small skiff. It was the only way available to get the timber that was up Mosquito Creek. Agostino and Socha had operated at that place for several years, three or four years. He had seen their camp, a very fine camp. He identified a letter that was marked for identification No. 37 (Tr. 287); that the Columbia Lumber Company watchman was in the Stanley Socha and Agostino house when he was there last. That was about a month or so ago, possibly March or April of this year. He thought about the first of May. The watchman is Mr. Hooper. He saw the sawmill there, about six or eight hundred feet from the camp. The watchman is still an employee of the Columbia Lumber Company. The Columbia Lumber Company took out about two million

feet of logs. They were still cutting; still using Mosquito Creek Inlet and Outlet. They are using all of the Creek now. They have cut the timber a mile and one-half up the stream, they have rights about three miles. Agostino and Socha had 250,000 feet to cut as shown by the extension. (Tr. 292.) The Columbia Lumber Company is cutting all the timber there. The part that was allowed to Socha and Agostino has been cut by the Columbia Lumber Company. That the Columbia Lumber Company are cutting in there now. (Tr. 292.)

And on redirect examination, he testified: That Mr. Hooper was in the Agostino and Socha Camp in the Spring before the trial. (Tr. 304.)

Then J. F. Hooper was called by the defendant, and testified that he was an employee of the Columbia Lumber Company at Barry Arm, and was so employed during the fall of 1948. He was the boom man. Came to Barry Arm around the first of August. His wife was with him. He occupied one of the camp buildings of Bruno's camp. Moved there around the first of August. He received instructions from the Columbia Lumber Company to leave the camp the latter part of August. He stayed in the camp that winter. Saw Mr. Jacobsen in the Spring.

On cross-examination, he testified (Tr. 338.) He saw Agostino in late August, came in a plane. He stayed in his cabin, the little cabin off to itself. He identified a note that he had written. The note states: "Mr. & Mrs. J. F. Hooper, occupying this house by permis-

sion of the Columbia Lumber Company, August 30, 1948, witness". (Tr. 339.) Before going to Barry Arm he was the boom man for the sawmill at Whittier. *Was still living at Barry Arm Camp when he testified, in the same place.* (Tr. 340.) *Still working for the Columbia Lumber Company as boom man. They were there cutting timber the day he left. Monday, he guesses it was. Monday of the week he testified.*

Then Edward F. McAllister was called by the defendant and testified that he was at Barry Arm Camp on the 15th of April, 1948. (Tr. 343.) There was about eight men working at Barry Arm when he arrived. (Tr. 344.) Mr. Lambert left and Earl Proud came up to run the camp. (Tr. 347.) The Socha and Bruno equipment was brought over to the Columbia Lumber Company camp. Two men were working on the cats. The small cat was used to haul supplies from the beach and to haul over parts to fix the big cat. If he was going to buy it, he wouldn't give over $3000.00 for the donkey engine.

Thomas A. Morgan, the president and general manager of the Columbia Lumber Company was then called by the defendant and testified that the Columbia Lumber Company was an Alaskan corporation, organized in the Spring of 1947, operated entirely in Alaska. The company produces lumber and building materials with two different sawmills, and distributes the same, operates two boats, and other equipment. In March about the 20th or 21st, he received a long distance call from Whittier while he was in the New Washington Hotel in Seattle, talked with Mr. Lambert

and Mr. Rowell. Both men were very much excited. He recognized that it was a maneuver to force his company to take a lot of equipment he had no use for. He told Lambert and Rowell he would notify them in two or three days as to what he could do personally as to coming up. Was scheduled for a trip up in April. He returned to Juneau, wired them as to schedule, he told them to proceed into the area and go ahead with the establishment of the camp. That he would be up as previously stated. He did come up. He believed he arrived in Whittier on April 9, and made a trip to Barry Arm with Mr. Rowell, his mill superintendent at Whittier. Met Lambert and Agostino. Agostino wanted $25,000.00. That he had talked to the other gentlemen about and told the witness he would sell for $19,000.00. He later had a meeting in Mr. Butcher's office with Agostino. He was very reluctant to make a commitment at any price. (Tr. 379.) The final figure agreed upon was $10,000.00. He then testified (Tr. 389), "he secured legal advice that I was entitled to receive under the contract and informed our foreman that Barry Arm Camp at our camp, that a contract had been included and to proceed with the repairs of the tractors at that time." The tractors were taken to our camp and put in the shops and repairs were started. (Tr. 389.)

He testified on cross-examintion that a new RD or D-8 cat would cost $18,000.00, and an RD-7, approximately $17,000.00. (Tr. 427.) He testified that he did not pay any money to Bruno Agostino, did not offer to pay any. (Tr. 439.)

Then Basil I. Rowell was called as a witness for the defendant and testified that he was known as "Ted" Rowell, *that he in 1948, was manager of the Columbia Lumber Company at Whittier. Was in that capacity until last fall; was there in the spring of 1948.* Saw Bruno Agostino several times in the latter part of March, or the first of April. Mr. Lambert was with him; had conversations with Agostino. Agostino wanted to see Mr. Morgan. The witness told Agostino he would get in touch with Morgan. He and Mr. Lambert did get in touch with Mr. Morgan. Mr. Morgan said he would be up shortly. He went back to Agostino, took a wire out and showed it to him to the effect that Morgan would be there, doesn't have the wire now, doesn't know where it is. He showed the wire to Agostino. Agostino said all right, he was satisfied. Mr. Morgan subsequently came up, close to the middle of April. When Mr. Morgan came up that they went to see Mr. Agostino. Lambert was there. A conversation took place between Agostino, Morgan, Lambert and the witness. Agostino wanted $19,000.00, Morgan said it was too high.

On cross-examination, he testified that the Columbia Lumber Company furnished the equipment for use at Barry Arm and sent it up there; the equipment belonged to the Columbia Lumber Company. (Tr. 554.)

Please note the statements of Mr. Rowell in the cross-examination (Tr. 552 to 572), especially testimony about the telegram, read to Bruno Agostino.

Mr. Kenneth D. Lambert testified on redirect examination that Mr. and Mrs. Morgan, Agostino, Gilbert

and others were on a boat trip together up to Barry Arm Camp on July 10th. (This in contradiction of Mr. Morgan's testimony that he never saw Agostino from after leaving Butcher's office until late in fall. (Tr. 580.))

That in the conversation down at Barry Arm Camp on April 10 between Mr. Morgan, Mr. Agostino, Mr. Rowell and the witness, that Mr. Morgan agreed that Mr. Agostino could keep the little cabin, that it was of no use to the Columbia Lumber Company whatsoever. (Tr. 594.)

The Columbia Lumber Company assumed all obligations of the Camp One operations. "Mr. Morgan told me that I could use that equipment, that was at the time I terminated with the Columbia Lumber Company". (Tr. 598.)

Bruno Agostino testified on redirect, that when he was there he saw one of the cats, the D-7, working; it was coming from the woods toward the camp. The D-8 cat had an arch on it which belonged to the Columbia Lumber Company. (Tr. 613-614.)

I.

ANSWER TO ARGUMENT OF PLAINTIFF IN ERROR.

It is quite apparent from a careful reading of the brief of plaintiff in error, that assignment No. 1 is the assignment principally relied upon for reversal, therefore, we have gone into the evidence further than would otherwise be necessary.

First, permit us to quote the statements made by the learned trial judge at the close of plaintiffs' evidence in chief in answer to the motion for an instructed verdict. (Tr. 278.)

"In this case there was a discussion into the price, but the parties evidently didn't agree upon the price, but the Columbia Lumber Company did agree to take over the property and accepted possession of it and in that respect I am convinced that Mr. Lambert was their agent and having accepted possession of the property, they are bound to pay the reasonable value thereof."

Not only was Mr. Lambert their agent, but this whole scheme was confirmed by Mr. Morgan when he came to the property on the 10th of April. He didn't then reject anything except the price of $25,000.00. He didn't tell his people to go away and not bother Mr. Agostino any more. He was quite willing to take everything they could give, and take his chances on payment of it later, in some fashion; got it as cheap as he can, which, I suppose, is legitimate business. But he cannot be permitted to get all the benefits that Agostino could give him and then walk away saying, "I am not bound to pay anything", "you will have to look to some independent contractor, or to the man in the moon for your pay," and "it isn't worth anything." (Tr. 278.)

Appellant in its brief, quotes from the testimony of Mr. Thomas Morgan, a few sentences that if standing undenied would be favorable to appellant's theory set

forth in this appeal, but this testimony denied and disputed by other witnesses, creates a disputed question of fact, and the same is true as to all quotations set out under this assignment of error.

Under the circumstances established by the evidence, the jury and the trial Court had a perfect right to find for the plaintiffs. There was an offer to sell by plaintiffs, and an acceptance by defendant, and the defendant would be estopped to deny liability to the extent of the value of the property and rights surrendered by plaintiffs which were taken by defendant, and the verdict of the jury and the judgment of the Court, being well within the range of value of the property and rights delivered as testified to by creditable witnesses, should not be disturbed on appeal.

The cases cited by appellant do not, in our humble opinion, sustain their contention and in most cases are not in point.

The first case cited by appellant, to-wit: *Work v. Kinney,* 63 Pac. 596, is not in point at all. This is an action against a sheriff, and a careful analysis of the case leads us to the conclusion that it is contrary to the contention of appellant. And the next case, *Cannon v. Fidelity Phenix Fire Insurance Company,* 205 N.W. 942, and modified in 207 N.W. 528, is a fire insurance case where certain wheat did not belong to the policy holder, and we can't understand anything in that case that would lend any comfort to the appellant; the *Phillips v. Yarter* case found in 156 N.Y.S. 875, is not in point; it was a case where it was obvious

that the plaintiff gave false testimony upon which the judgment was based, and the testimony was later established to be false by documentary evidence and indisputable circumstances; and the next case cited, *National Life and Accident Insurance Co. v. Langston,* 42 S.W. (2d) 1037, is based upon a false statement in an application for insurance; and the *O'Brien v. Allston* is a Utah case, 213 Pac. 791, misses the point involved, so far, and such a different set of circumstances are involved, that we cannot see the relevancy thereof. The *O'Brien* case involved an automobile accident wherein the plaintiff's driver admitted a set of facts that conclusively established a violation of the state law of Utah and those facts were the direct and proximate cause of the accident, and created contributory negligence, as a matter of law, and we are at a loss to understand why counsel for appellant cites this case.

The case of *Crescent Manufacturing Company v. Hansen,* 24 Pac. (2d) 604, being the next case cited by appellant, is more favorable to our side of the case, and might be cited to uphold the judgment. The fourth syllabus reads:

> "4. Appeal and error, key 979(1).
>
> New Trial key 70.
>
> Whether new trial should be granted for insufficiency of evidence is addressed to trial court's discretion, *and ruling will not be disturbed except for manifest abuse.*" (Emphasis ours.)

And syllabus number five reads:

"5. Trial key 139(1).

Whether evidence satisfies legal standards as to degree of proof is for jury in first instance and trial court in final instance."

And the only part of said opinion that casts any favorable aspect for the appellant is found in the following wording on page 606:

"There is a clear distinction between the powers and duties of an appellate court and those of a trial court respecting the determination of the question of the sufficiency of evidence to support a verdict or other decision of fact. Undoubtedly, an appellate court may set aside a verdict which is wholly unsupported by the evidence or which is so clearly against the evidence that it could not have been reached by any fair and intelligent man. *But the appellate court may not review the evidence merely to determine its preponderance or weight.* Whether or not a new trial should be granted because of insufficiency of the evidence is addressed to the sound discretion of the trial court, *and the ruling thereon will not be disturbed except for manifest abuse of discretion.* It is for the jury in the first instance, and for the trial court in the final instance, to say whether the evidence satisfies legal standards as to degree of proof." (Emphasis ours.)

Surely this case does not support the assertion in appellant's brief.

The next and last case cited, *Magnolia Petroleum Company v. Bell,* 55 S.W. (2d) 782, is another damage suit and no more in point than those cited above, but the first syllabus reads:

"1. Appeal and error, key 930(1).

Reviewing Court must view evidence and inferences therefrom *in light most favorable to prevailing party,* in determining whether there was evidence to support jury's finding." (Emphasis ours.)

It is the appellees' contention that they had established at the mouth of Mosquito Creek, a logging business where they had operated four years, and the appellant, Columbia Lumber Company had made a timber purchase farther up the creek, and that to successfully operate in an economical way, they needed the property of Agostino and Socha. Both of the men being quite old, and Agostino being at the scene alone, the Columbia Lumber Company sent their mill superintendent, Rowell, and another employee by the name of Lambert, and attempted to bluff their way in, on Mr. Agostino, who was then seventy-one years of age, a man with very little education, but determined to protect his rights, and when they tried to land and set up their equipment in the midst of his operation, he refused them that privilege, explaining to them that Mosquito Creek was only large enough for one operation, and that he had 250,000 more board feet of logs paid for, and his equipment was all there, and that if he allowed them to come in there, take over his log ponds, booms, and rafting grounds, that he could not work his timber, and refused them entrance, which he had a perfect right to do. They went away and returned and made another attempt to get him to let them in. At that time, a discussion took place con-

cerning the Columbia Lumber Company buying Agostino and Socha out for $25,000.00. The testimony shows that they had that much invested in their machinery, equipment, buildings, and tools, and also had paid for an additional timber permit: justifying the cutting of 250,000 board feet. The evidence shows that Lambert and Rowell then communicated with Mr. Morgan, the president of the Columbia Lumber Company, the facts concerning the sale and purchase of the equipment of Agostino and Socha; and that Morgan sent a telegram to Ted Rowell, or Mr. Lambert, for the purpose of it being shown to Mr. Agostino, to the effect that he would be up and settle with them on the 10th of April, following. Of course, there was some contradiction of this evidence as to the exact content of the telegram. The jury had a right to believe the plaintiffs' contention of what the telegram said, and it was up to the defendant to present the telegram and it failed to produce it, to show a different set of facts. The natural inference is that the telegram would have corroborated the testimony of Agostino, or the Columbia Lumber Company would have produced it in Court as the undisputed evidence is, that the telegram was shown to Agostino and was read to him, and was then taken back by Ted Rowell, the superintendent for the defendant company. Taking the most favorable evidence on the plaintiffs' side, and eliminating the most unfavorable evidence to the contrary, which is the rule adopted in cases similar to this, then you have a sale and delivery to the defendant, who took all that the plaintiffs had to sell.

The Columbia Lumber Company received exactly what it wanted; it took over the exclusive operations; it took everything that the plaintiffs had; it cut their timber; it used their log pond; their roads; and even used the caterpillars to some extent at least; took possession of the buildings, and still had them during the trial, and were still operating there. We can't understand appellant's theory of the case; to follow it, one would have to indulge in the most extreme imagination, utterly disregard the evidence, and merely take the fantastic conclusions drawn by the attorneys for the appellant.

Applying the general rule of evidence as decided by this Honorable Court, in the case of *Inland Power & Light Co. v. Grieger, et al.,* 91 Fed. (2d) 811, the second syllabus reads:

> "Appeal and error key 931(1), 989
>
> In determining whether evidence supported judgment, Circuit Court of Appeals would consider evidence most favorable to appellees, with every inference of fact that might be drawn therefrom."

and from the body of the opinion on page 813, we quote:

> "In considering the evidence, we must consider only that which is most favorable to appellees, with every inference of fact that might be drawn from it. Maryland Casualty Co. v. Jones, 279 U.S. 792, 795, 49 S. Ct. 484, 73 L.Ed. 960."

This case is not only supported by those cited therein, but is also supported by a decision of the Seventh

Circuit, *McHale v. Hull,* 16 Fed. (2d) 781, and the third syllabus reads:

> "3. *Appeal and error key 989—Finding prevails on appeal, if there is any evidence to support it.*
>
> The only inquiry on review of finding for insufficiency of evidence is whether there is any evidence to support it."

In 1905, the Fourth Circuit Court of Appeals said in the case of *J. W. Bishop Co. v. Shelhorse,* 141 Fed. 643, quoting from the last part of the opinion on page 648:

> "4. Upon the whole case, we cannot perceive that the plaintiff in error was in any manner prejudiced by any of the rulings of the court below, in the trial of this case. As was said by Mr. Justice Lamar in Aetna Life Insurance Co. v. Ward, 140 U.S. 76, 91, 11 Sup. Ct. 720, 35 L. Ed. 371:
>
> *'It may be that, if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of the exceptions taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusal to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was property admitted'*—citing *Minor v. Tillotson,* 2 How. 392, 393, 11 L. Ed. 312; *Keller's Lessee v. Eckert,* 4 How. 289, 11 L. Ed. 979; *Dirst v. Morris,* 14 Wall. 484, 490, 20 L. Ed. 722; *Prentice v.*

Zane, 8 How. 470, 485, 12 L. Ed. 1160; *Wilson v. Everett,* 139 U.S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286."

In the case of *Fidelity and Casualty Co. of N. Y. v. Howe,* consolidated with *National Life Ass'n of Des Moines, Iowa v. Same,* 38 Fed. (2d) 741, syllabus one reads:

"1. *Appeal and error key 989—On Question of taking case from jury, reviewing court is concerned only with plaintiff's proof.*

On question of taking issue from jury, reviewing court is concerned with plaintiff's proofs, and not with countervailing proofs of defendants."

In a very recent case, *McGogney et ux. v. Mutual Life Ins. Co. of N. Y.,* 103 Fed. (2d) 649, the second syllabus reads:

"2. *Appeal and error key 989*

On appeal from judgment on directed verdict for defendant, Circuit Court of Appeals must determine *only whether evidence, with all legimate inferences therefrom, fairly tended to support plaintiff's contention, and exclude all conflicting evidence or inferences."* (Emphasis ours.)

We believe this to be the universal rule, and the plaintiffs in the case at bar had something the defendant wanted; they made the defendant a price; the defendant accepted what plaintiffs had, but failed to pay for it, and the only controversy that ever arose was the price, and the defendant's contention that it did not accept the offer was clearly brought before the jury

with proper instructions and it has no right to dispute its liability here. And, since the jury was extremely conservative, as to its extent of finding for the plaintiffs, as to the amount, as set forth in its verdict, and the trial Court, in our humble opinion, had ample opportunity to hear the evidence, see all of the witnesses, hear all arguments, and in our opinion, correctly overruled the appellant's motion for an instructed verdict, and for a new trial, and is amply sustained by the evidence and the law.

II.

IN ANSWER TO THE SECOND ASSIGNMENT OF ERROR, AGAIN COUNSEL FOR APPELLANT HAS OVERLOOKED THE EVIDENCE OF THE PLAINTIFFS, AND RELIES UPON THE EVIDENCE OF THE DEFENDANT, AND RUNS CONTRARY TO THE RULE STATED AND SUPPORTED BY CASES IN ANSWER TO ASSIGNMENT ONE.

We will not again quote the testimony, because we are confident the Court has it well in mind, and for purposes of brevity, we will omit repeating; but, it is imperative that we call your attention to the fact that the log pond of the plaintiffs was as much a part of their equipment for operating, as the caterpillars, roads, cables, houses and mill. It is quite apparent from the evidence that without the log pond, the operation would not have been a success.

The undisputed evidence was, that the log pond was dry at low tides, and Agostino testified there was about ten feet of water in it at high tide, and Lambert testified to about eight feet, stated that it was nice

rafting water. They each and all described the hand setting of the pilings there surrounding the pond. It was testified that logs were fastened between the pilings, that would rise and fall with the tide. It had to make a complete inclosure to hold the logs inside. The boom logs were equipped with chains at the end, and were fastened together.

Socha testified that the pond was cleared of stumps; that they were working on it for a long period of time, setting the pilings, and clearing the ground for a logging pond, even testified to the number of men, and the length of time worked. (Tr. 269-270.) Counsel for appellant seems to have missed the testimony that shows this was a small pond up Mosquito Creek some distance from the seashore, and that the pond went dry at low tide. At high tide the water came up Mosquito Creek and flooded the pond. Attorneys for appellant overlooked the evidence showing that the scow first landed at Agostino's place, and after Agostino surrendered possession to the defendant company, the scow was moved farther up into the logging pond, and landed there. And the pond was actually used in the logging industry of the defendant company, and some more pilings were driven in, in another location, or at least a temporary change in the lines of the pond, but this all came about after possession was surrendered to the Columbia Lumber Company. The testimony is clear and undisputed that the appellees, Agostino and Socha, had actual and complete possession of not only the log pond but also the surrounding territory at the mouth of Mosquito Creek by reason

of the Government issuing to them the timber cutting permits over a period of four years, just prior to March 1948. (Tr. 119-125.)

We have always been of the opinion, that instructions are considered as a whole, and that so long as the entire instructions do, with reasonable accuracy, state the law correctly, the fact that a single sentence in the instruction standing alone might be confusing is immaterial. We have carefully read instructions 5, 5-a, and 6, and in our humble opinion, they state the law more favorably to the Columbia Lumber Company, than it was entitled to, or at least, as favorably as the defendant company could possibly ask for; and states more favorably to the Columbia Lumber Company than the cases cited by its attorneys here. Instruction 5 that appellant is complaining of, has this sentence in it:

> "and likewise, the defendant had and has the lawful right to use unoccupied portions of the public domain, and unoccupied tide land, and possession of such area by the defendant does not constitute any evidence of sale."

Then the following sentence in instruction five should be noted:

> "It should be noted that as respects tide land, actual possession is necessary to establish superior right. Without actual possession, all persons enjoy equal right to use thereof."

In the first place, the appellant has cited no cases in its brief holding to the contrary, and, in fact, the

cases cited would each justify a much stronger instruction in favor of the plaintiffs in the Court below.

It is quite apparent from the reading of the transcript, that there was no serious objection stated to instruction five. However, there was an exception to certain portions of instruction five. (Please note Tr. 637.)

The first case cited by appellant, to-wit: *Juneau Ferry Co. v. Alaska Steamship Co.*, 1 Alaska 533, could not possibly be considered as supporting the contention of the appellant. In that case, Judge Brown used these words:

> "If they have possession, it must be such character of possession as keeps all others out, and such as constitutes actual occupancy by themselves."

In the case at bar, the Columbia Lumber Company attempted to land in the midst of Agostino and Socha's operations, and were denied the right to land. The mill superintendent, Rowell, and Lambert recognized Agostino and Socha's right there, and made no further effort to land until, as Lambert put it, he understood that Agostino was selling everything to the Columbia Lumber Company, and it is quite apparent, at least, that Agostino, being a man of very limited education and quite an old gentleman, thought that the words, "I will be down and settle with them" meant that the Columbia Lumber Company had agreed to buy his property and interpreted the act of Rowell and Lambert in showing him Morgan's telegram and the other things, that took place, that the Columbia Lumber

Company was buying him and Socha out for $25,000.00. This is so forcibly brought home by the fact that he turned over possession of everything to Lambert and Rowell, who were both working for the Columbia Lumber Company at the time and possession was taken by the Columbia Lumber Company of everything they wanted. The instruction five is not affected in any way by the *Juneau Ferry* case.

This Honorable Court in modifying the *Juneau Ferry* case, 2 Alaska Fed. Rep. 59, and 121 Fed. 356, never in any way made a statement of law contrary in the slightest degree to the instruction given by the Honorable Anthony J. Dimond, which instruction is the one objected to here.

The case of *Haines Wharf Co. v. Dalton, et ux.,* 1 Alaska 555, merely holds that persons who have abandoned one entire boundary line, leaving the limit of their claim open, indefinite and undetermined, are limited in their possessory claims to lands actually occupied. We can't understand where that case in any way holds against the instruction given. It seems to support it in every way, and we see no reason to comment further on that.

The next case referred to, of *Gordon v. Ross Higgins Co.,* 162 Fed. 637, is an opinion from this Honorable Court, and involves an abandonment of a town lot in Fairbanks, from 1903 until 1906, and the very quotation set forth in the appellant's brief on page 25, shows that it has nothing whatsoever to do with the case before the Court, or with the instruction complained of.

The next case cited, *Courtney v. Turner,* 12 Nev. 343, is very favorable to the appellees, especially the following portion:

> "actual possession of land consists of subjecting it to the will and dominion of the occupant, and must be evidenced by those things which are essential to its beneficial use."

Agostino and Socha unquestionably had possession of this log pond from the time they started building it and for the following four years, at least, and until they turned it over to the Columbia Lumber Company.

The next case cited, *Crawford v. Burr,* 2 Alaska 33, is so far from the question involved, we feel that a casual reference is sufficient. In that case, there was a military reservation at Valdez, which was abandoned in 1902. The plaintiff was in possession of a stable thereon, but without any fixed boundary, without any other claim or right to any fixed portion of the ground. He abandoned it, the brush grew up over the barn, and there was no fence of any kind, left standing, no markings or monuments of any kind, and the land was located by townsite claimants. The Court held that the plaintiff was entitled only to the land occupied by his stable, which was all he had under his control, and surely could have no bearing on the case at bar, and nowhere does Judge Wickersham indicate a single phrase that would support appellant's contention with relation to its objection to instruction five.

There are many cases in Alaska that are much more in point in this argument than those cited by appellant, especially the following:

Young v. Fitzgerald, 4 Alaska 52, the only syllabus reads, as follows:

> "1. Public Lands (p. 31*)—Occupancy—Indians —Tidelands. On May 17, 1884, and for many years prior thereto, one Yach-goos, an Indian, was in possession of a small tract of upland abutting on the seashore near Juneau, Alaska. He had cleared the rocks from a narrow strip of the land, giving him access from the sea to his home, and on this cleared strip of tidelands set stakes, to which he moored his canoes. In 1902 plaintiff entered upon the tideland strip and set piles, without the Indian's permission, and thereafter claimed the possessory title to the strip for wharf purposes. In 1908 Yach-goos conveyed his possessory rights by deed to Mrs. Fitzgerald, an Indian woman, who entered into possession. Plaintiff brought suit praying for an injunction to prevent defendants from trespassing upon the premises. *Held,* under Act May 17, 1884, c. 53, 23 Stat. 24, the Indian occupancy could not be disturbed by the plaintiff, and injunction denied."

Other cases supporting the theory of law expressed in the instruction five are:

> *Decker v. Pacific Coast SS. Co.,* 164 Fed. 974;
> *McKloskey v. Pacific Coast Co.,* 160 Fed. 794.

In 3 Alaska 77, the sixth syllabus reads:

> "6. Navigable waters (p. 39*)—Public Lands—Tide Lands. A trespasser *held* to have no right

to go upon tide land in front of the upland owner and erect structures or buildings which interrupt or interferes with the right of the upland owners' access to deep water in front of his upland property, and injunction issued to prevent the trespass."

And from the body of the opinion on page 88, we quote:

"The evidence on the part of the plaintiff discloses a series of actions on its part and the part of its grantees which completely and entirely refutes and contradicts any idea of abandonment or forfeiture of their rights as upland holders. The court is of the opinion that, while the plaintiff has in law no title to the tide lands, that remaining in the United States for the benefit of the future state, *it has a right of uninterrupted access thereover to the deep water, and that the defendant had no right or warrant, under the law, to go upon the land for the purpose of the erection of any structure or building which would interrupt or interfere with this right of the plaintiff,* that he was therefore wrongfully on the land, and that the plaintiff is entitled to the relief for which it prays in its complaint." (Emphasis ours.)

A close observation of what took place in the trial of this case as set forth in the printed transcript at pages 651, 652, and 653 shows that the Court made some changes in the instructions to please the defendant, and on page 651, you will find the following wording:

The Court. I am going to follow counsel's suggestion and insert "or some part thereof", on page 3 before defendant's counsel take their exceptions.

Mr. Davis. That will be "* * * then accepted and received said——"

The Court. "or some part thereof".

Counsel for defendant may take exceptions.

Mr. Boochever. The only one is in regard to Instruction 5 on page 2 where it states "Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings." We think that after that there should be added "and that the superior right established by such position extends only to such structural improvements and not to unoccupied portions of tide lands" or some such similar provision so that they will understand that a few pilings in a tideland pond does not give exclusive right to the whole pond but only to the portions occupied by the pilings.

The Court. Exceptions will be noted. Now, as to the instruction requested, I have marked each of them refused except as covered by instructions given and exception taken and I have signed it and these instructions will be filed now with the clerk and may be considered as incorporated in the reporter's notes at this time, or as immediately following the taking of exceptions originally whichever counsel desires. (671)

* * * * * * *

Mr. Bell. Either way.

Mr. Davis. Entirely satisfactory with me.

Mr. Bell. Entirely satisfactory with us.

Mr. Boochever. Your Honor, what is your position in regard to a sealed verdict?

The Court. Well, if counsel stipulate there will be a sealed verdict. It is up to counsel. I do not feel that I have the right to impose a sealed verdict unless counsel agree to it.

Mr. Boochever. I frankly would rather not have one because I could leave by seven tomorrow, but I do not want to hold my personal desires in opposition with the Court.

The Court. It doesn't bother me at all. I am a wakeful individual.

Mr. Davis. So far as I am concerned I would prefer a sealed verdict if everybody else is agreeable.

Mr. Bell. I would too.

The Court. We will not have it unless everyone stipulates.

Mr. Boochever. We will stipulate.

Mr. Bell. We will stipulate.

which clearly shows that no one took an exception to instruction 5, but Mr. Boochever states: "We think that after that there should be added 'and that the superior right established by such position extends only to such structural improvements.' "

It is quite apparent from the record that the instructions as given here accepted by Mr. Davis, one of the counsel for defendant, and passed by Mr. Boochever, the other counsel for defendant, with merely a suggestion that he thought it should be followed with the words: "and that the superior right

established by such position extends only to such structural improvements".

We have carefully analyzed the decisions affecting Alaska, and apparently the Honorable Anthony J. Dimond, stated the law exactly as it should be stated in Instruction 5.

III.

THE DISTRICT COURT ERRED BY REFUSING TO INSTRUCT THE JURY THAT KENNETH LAMBERT WAS AN INDEPENDENT CONTRACTOR AT ALL TIMES AFTER APRIL 1, 1948 SINCE ALL THE ORAL EVIDENCE AND THE WRITTEN CONTRACT EXECUTED BETWEEN THE APPELLANT AND LAMBERT COULD ONLY BE CONSTRUED AS ESTABLISHING AN INDEPENDENT CONTRACT RELATIONSHIP.

In answer to the third assignment of error, it is apparent from the testimony that it made no difference whether Lambert was an independent contractor after April 1, 1948, until he left about the 14th of July, at which time some other man took over for the Columbia Lumber Co., and continued cutting timber and using the plaintiffs' roads, log ponds, buildings, improvements, machinery, and equipment, and so far as the record shows, were still using them at the time of the trial of this case. The undisputed testimony that Lambert & Howell were both employees of the Columbia Lumber Co. in March when they landed and took over plaintiffs' property, and the question as to whether Lambert became an independent contractor as of April 1, and so continued until approximately July 14, could not possibly make any difference as to

the obligation of the Columbia Lumber Co. and still, so far as we know, is held by them. It should be remembered that during the trial of the case, that the Columbia Lumber Company had charge and possession of the cook house and the bunk house, and Mr. Hooper, one of the employees of the Columbia Lumber Co. testified that he was still living in it at the time of the trial. It should also be borne in mind, that the timber that had been paid for by the plaintiffs, northwest of the large house and camp, was all cut and the logs went to the Columbia Lumber Company. Therefore, it is absolutely immaterial whether Lambert was an independent contractor after April 1, 1948, until July 14, and it could make no difference because at the time the Columbia Lumber Company, acting through its mill superintendent, Mr. Rowell, and a then employed man, Mr. Lambert, did take possession of everything with the consent of Mr. Agostino, who positively testified and no one contradicted his testimony, that he turned everything over to Mr. Lambert and Mr. Rowell for the Columbia Lumber Company, after they showed him the telegram and told him that Mr. Morgan would be up the 10th of April to settle with him, and there was never a single person who testified to the contrary. It must be borne in mind that the evidence conclusively shows that Lambert and Rowell were both acting as employees and agents of the Columbia Lumber Company all during the month of March, 1948, and in their trips to Barry Arm, and back to communicate with Mr. Morgan, were all made at the instance and request of Mr. Morgan, who was president

of the Columbia Lumber Company, and all of their acts were guided by instructions from Mr. Morgan. Whether or not Mr. Morgan conceived an idea that he could deceive these two old gentlemen, Agostino & Socha, because of their lack of education and due to their being quite old, and did intend to get possession of the mouth of Mosquito Creek, the log pond, the roads, buildings, and all of their logging operations without ever becoming obligated to pay therefor, or not, nevertheless, Agostino offered to sell and give possession, and Mr. Morgan, the president of the Columbia Lumber Company, either fully intended to buy them out, or attempted to cheat them out of their assets, and it would be nicer to say of Mr. Morgan, that he intended to buy them out, and pay them the reasonable value of their holdings, than it would be to say that he attempted to cheat and defraud them. And, assuming that either was true, then Mr. Morgan and his employees, Ted Rowell, and Blackie Lambert, did get exactly what they wanted, they had to have the mouth of Mosquito Creek, the log pond, the equipment, including the roads, to get to a large quantity of timber they had purchased farther up the creek; and whether or not the Court refused to give an instruction offered by the defendant as to Blackie Lambert's being an independent contractor after the first of April, was as immaterial as the law of arson, as far as this case is concerned. And, you will note that after the instructions were read and the Court called us up to the bench, to see if we wanted any exceptions, the only exception taken was by Mr.

Boochever as above set forth, and to raise a back-hand question of this kind for the first time, in the Appellate Court, would be extremely unjust to the trial judge.

IV.

IN ANSWER TO THE FOURTH ASSIGNMENT OF ERROR THAT THE ALLEGED ORAL CONTRACT OF SALE ON MARCH 24, 1948, WAS NOT ENFORCEABLE AS FALLING WITHIN THE PROVISIONS OF THE STATUTE OF FRAUDS, ACLA 1949, SECTION 29-1-12, SINCE THERE WAS NO SUCH ACCEPTANCE OR RECEIPT AS TO TAKE THE CONTRACT OUT OF THE STATUTE, AND THE COURT'S INSTRUCTION NO. 4 WAS ERRONEOUS IN STATING UNDER THE CIRCUMSTANCES OF THIS CASE THAT "AN ORAL CONTRACT FOR THE SALE OF PERSONAL PROPERTY MAY IN LAW, IF PROVED, BE JUST AS VALID AND ENFORCEABLE AS THOUGH IT WERE WRITTEN".

In our humble opinion this assignment is without merit, since the evidence all shows actual delivery and the complete taking of possession of everything by the defendant company, and there is no better settled rule of law than that an oral contract for the sale of personal property, may in law if proved, be just as valid and enforceable as though it were written. This is an elementary rule of law, and we would not want to insult the intelligence of this high Court by citing authorities on that statement, as the law cited by appellant is apparently based upon an erroneous assumption, that no part of the property sold was ever delivered. Agostino testified positively, and so did Lambert, that after the telegram from Mr. Morgan was shown to him, and after the conversation there on the bank

of Mosquito Creek concerning the fact "that Mr. Morgan would be up and settle with him on the 10th of April", that Mr. Agostino immediately turned over everything to the Columbia Lumber Company. That is Agostino's testimony, and the jury had a perfect right to believe it, if it cared to, and especially so, when there were only technical denials of the actual delivery and an admission of Lambert that he was given a free hand to go where he cared to go, to use anything he wanted to use, and Agostino testified, and the matter stood undisputed, that the tools and things in the garage were used from that day on; the defendant located its camp there; started putting its equipment in readiness for operation, when the snow went out, it put its logs in the log pond from the very instant it started cutting timber. It is apparent, however, that here was some kind of a scheme by the defendant company, or we might say, a delayed action on its part, until it was safely established in the midst of the operations of Agostino and Socha, but there never was a time, and not a word of evidence to indicate that Agostino interfered in the least with the Columbia Lumber Company's possession of everything at Barry Arm. Therefore, the cases cited by the appellant have no earthly application to the case at bar, and if Agostino's testimony was believed which the jury had a perfect right to do, then there was a sale and delivery, an absolute and complete delivery, unconditional and unequivocal, and just how the defendant, Columbia Lumber Company, handled its acceptance of the delivery makes no difference, because

it did accept, retain, and use the roads, the log pond, the buildings, the site for its own camp, the garage, tools, extra supplies, and anything it wanted. Therefore, we submit, that the fourth assignment of error is directly contrary to the law and the evidence in the case, and the Court's instruction could not be anything but right under the evidence introduced.

V.

AS TO THE FIFTH ASSIGNMENT OF ERROR, AS FOLLOWS, TO-WIT: ON OR ABOUT JUNE 29, 1948, THE PARTIES HERETO ENTERED INTO AN AGREEMENT FOR THE SALE OF THE PROPERTY IN QUESTION. SINCE THIS AGREEMENT WAS REDUCED TO WRITING, SIGNED BY APPELLEES, AND SINCE APPELLANT TOOK POSSESSION OF THE PROPERTY UNDER THE TERMS OF THIS AGREEMENT, THE COURT ERRED IN PERMITTING EVIDENCE TO BE INTRODUCED OF AN ALLEGED PRIOR INCONSISTENT ORAL AGREEMENT INVOLVING THE SAME TRANSACTION.

The evidence throughout the case shows that there was an honest, conscientious effort on the part of Mr. Agostino, to compromise and settle the dispute with the defendant, Columbia Lumber Company. He tried diligently to collect the money that he had coming, and it must be borne in mind that he never at any time went back into the possession of the equipment and operations at Barry Arm, but on the contrary, the Columbia Lumber Company had everything it wanted, and was operating at full blast. The only trouble that Agostino & Socha had was trying to locate Thomas Morgan, the president of the Columbia Lumber Company, and make him pay off. Mr. Morgan, having ex-

actly what he wanted, was as elusive as the man in the proverbial invisible suit. Finally, Mr. Butcher did get him located by telephone, and did get him in Anchorage. Wherein, he did agree to pay $10,000.00 to the plaintiffs, but Mr. Butcher prepared the contract, and Agostino signed it, and it was sent to Mr. Morgan, but so far as the evidence shows, it was never signed by Mr. Morgan until after this suit was filed and Mr. Agostino testified positively that he never did see the original, or a copy of that contract, that was signed by the Columbia Lumber Company, acting by and through Thomas Morgan, or anyone else, until on the witness stand in the trial of this case. This was only an offer of compromise which was made in good faith on the part of Agostino, and dodged and evaded by the Columbia Lumber Company, acting through its president, Thomas Morgan, and I imagine the jury did not believe Thomas Morgan when he evasively testified concerning the signing of this contract. When he couldn't remember just when he signed it, or under what circumstances he signed it, and after all, admitted that he had never paid a cent under the terms of said contract and had done nothing to comply therewith. Therefore, there was no written contract that became binding on Agostino as there was no signing and executing of it by the defendant, Columbia Lumber Company; and no delivery thereof to Agostino; none of the payments made; none of the terms mentioned in the contract, were ever met or complied with by the defendant, Columbia Lumber Company. Possibly the jury believed, which they had

a perfect right to do under the evidence, that the signing of this contract was an after-thought on the part of the defendant, after this suit was at issue. This is especially true since the answer sworn to by this same Thomas Morgan on the 2nd day of June 1949, and especially page 23 Tr., states that, he executed this contract as president for the Columbia Lumber Company and left certain checks with J. L. McCarrey, Jr., of Anchorage, Alaska, on the *10th day of July, 1948.* Then the exhibit introduced shows that it was signed on the 29th day of July, 1948, by Bruno Agostino, but when it was signed by the Columbia Lumber Company, does not show on the exhibit. All of the evidence is to the effect that it was first executed by Bruno Agostino and acknowledged before Harold J. Butcher, a Notary Public. This is borne out by the fact that the acknowledgment on the exhibit attached to the defendant's answer on which the case was tried shows an acknowledgment on the 29th day of July, 1948, by Bruno Agostino, but the instrument itself shows no acknowledgment at any time *by Thomas Morgan.* (Tr. 35.) Then attached to that instrument is a letter that Mr. Morgan claims to have written to Mr. Harold J. Butcher under date of *July 19,* 1948, and signed by Thomas Morgan, President, Columbia Lumber Company in which Mr. Morgan states: "I have signed a check in the sum of $3,300.00, and left it with Mr. C. D. Summers". This is, of course, specifically contrary to the answer signed and sworn to by Mr. Morgan, that he left checks with Mr. McCarrey in the amount of $5,000.00, on the 10th of July, 1948.

In the letter that Mr. Morgan had introduced in evidence, as above-described which is found at page 36 Tr., wherein he states: "I am sure you would not expect me to *sign* it without a definite understanding as to what the $10,000.00 is going to purchase", he there again contradicts his sworn answer in which he stated that he did sign and execute it on behalf of the Columbia Lumber Company on the 10th of July, 1948, and then in his testimony (Tr. 387), he testified that on July 10th or 11th, while in Anchorage and before he went to Whittier he signed the contract and the checks and left them with Mr. McCarrey, his attorney. Yet, no one ever, at any time before the trial ever delivered a signed original or a signed copy, of the contract to either Agostino or Socha, and the first time either ever saw it was during the trial.

Maybe the jury could see by the evidence that the overt act of the defendant clearly shows a scheme and an effort on the part of the Columbia Lumber Company to get what it wanted, and to pay nothing to the plaintiffs. Under the circumstances set forth in the record, we sincerely contend that there is no merit in the fifth assignment of error.

VI.

AS TO THE SIXTH ASSIGNMENT OF ERROR, WHICH IS AS FOLLOWS: THE COURT ERRED IN PERMITTING TESTIMONY OVER APPELLANT'S OBJECTION AS TO THE CONTENTS OF AN ALLEGED TELEGRAM PURPORTING TO GRANT APPELLEES A CONTINUATION OF THEIR TIMBER PERMIT.

In answer to the above assignment, we will set forth in detail, the testimony concerning this telegram, which will show conclusively to this Honorable Court, that there were no objections made, and that the evidence originally introduced went in without objections (Tr. 223):

"Q. Did Mr. Agostino show you any papers or anything at that time showing that he did have a timber purchase there?

A. Yes, he showed us a telegram he received from the Forest Service.

Q. Do you remember whether or not he gave you that telegram to take back with you?

A. Yes.

Q. And who did you give the telegram to?

A. Mr. Rowell has that telegram in his possession at that time.

Q. Can you remember the contents of that telegram?

A. Well, not word for word, it was a telegram from the Juneau office stating that he had a continuation of his timber sale of 250,000.

Q. Then what did you do with the boats at the time you and Ted were together there, where did you go after this conversation? (130)

A. We went back to Whittier."

Then later, at the time Mr. Lambert was testifying on redirect examination, the following took place; first we call your attention to an objection stated by Mr. Boochever (Tr. 582):

"Mr. Boochever. *Object to as improper rebuttal testimony.*

The Court. Objection is sustained.

Q. (by Mr. Ross). Do you recall seeing any timber at all in between a site where Agostino and Socha had cut out trees on the east side of Mosquito Creek at Barry Arm Camp and the place where you started cutting timber for Columbia Lumber Company?

Mr. Boochever. Object to that question for the same reason and also for the further reason it is a leading question. (534)

The Court. Objection is sustained.

Q. (by Mr. Ross). I will ask you then, Mr. Lambert, was there any merchandisable timber standing between Agostino's old cutting and where Columbia Lumber Company starting cutting?

Mr. Boochever. Same objection.

The Court. Same ruling. The matter was covered fully in examination in chief.

Q. (by Mr. Ross). Mr. Lambert, do you recall seeing a telegram in the office of the Columbia Lumber Company at Whittier in the spring about March or April, sometime in the spring of 1948, addressed to Bruno Agostino?

Mr. Boochever. Object to that question for the same reason, Your Honor.

The Court. I do not recall whether that question was asked or not, and therefore the objection is overruled.

Q. (by Mr. Ross). Answer?

A. I saw that telegram that Mr. Agostino gave me, that I took to the Columbia Lumber Company office and I left it there.

Q. Mr. Agostino gave you?

A. Yes.

Q. Where did Mr. Agostino give it to you?

A. At Barry Arm. (535)

Q. Do you know about what time that was?

A. It was sometime in March.

Q. Was it 1948?

A. 1948, yes.

Q. Who was the telegram from, Mr. Lambert?

A. From the Forest Service in Juneau.

Q. Did you read the telegram?

A. Yes.

Q. Will you state to the jury what was in that telegram?

Mr. Boochever. Object to that as hearsay, Your Honor.

The Court. Telegram must be accounted for before any secondary evidence can be offered upon it.

Mr. Boochever. But the secondary evidence is something which someone in The Forest Service sent to Mr. Agostino. It is irrelevant and hearsay anyway whether it is in writing or oral.

The Court. Official communication upon the subject—upon anything concerning the subject of the

action I think would be admissible. The objection is overruled.

Q. (by Mr. Ross). Go ahead and answer?

A. Well, the——

The Court. Don't answer. There is no proof as to where the telegram is. Mr. Agostino is here.

Q. (by Mr. Ross). Do you know what became of the telegram that was delivered to Bruno Agostino?

A. The last I saw of it was in the Columbia Lumber Company office at Whittier.

Mr. Ross. I ask you, counsel, for this telegram.

Mr. Boochever. I wish to state we have asked for all telegrams and all communications about this matter from Whittier and we have never received or been able to obtain any copy of such a telegram or any other telegram which is bearing on this case.

Q. (by Mr. Ross). Do you know where that telegram is now, Mr. Lambert?

A. No.

Q. Did you read that telegram?

A. Yes.

Q. State to the jury what was in that telegram?

A. Well, it was informing Mr. Agostino that he had a continuation of his timber sale and the exact wording of it, I can't remember but that was the text of it.

Q. It was a continuation of the timber sale?

A. Yes.

Q. You mean at Barry Arm?

A. At Barry Arm.

Q. And that was in March of 1948, I believe you say?

A. Yes. (537)"

It is quite apparent that the objection made by Mr. Boochever, that it was improper rebuttal testimony, was never again repeated after Mr. Ross demanded counsel for the Columbia Lumber Company to produce the telegram from their files. It will be noted by the last five questions and answers, that this testimony was never objected to and especially when the evidence was first put in as shown by Tr. 223; no objection whatever was made, and the evidence was all in, and all that took place later was perfectly harmless, and the only reason for objecting to it, was that it was improper rebuttal testimony, and if it was improper rebuttal, and the Court had erred in admitting it, it was a perfectly harmless error, and there would be no reason for reversing the law suit, since the testimony that was objected to by Mr. Boochever, was practically all excluded by the Court, and the last five questions and answers were the only parts of the testimony of this witness with reference to the contents of the telegram that was given after any objections had formerly been made, and these last five questions were not objected to, but were apparently thought to be competent by the attorneys for the defendant and in truth and in fact, they were competent. The evidence all was to the effect that the defendant had the telegram in its possession, and that Mr. Ross, one of the counsel for the plaintiffs, requested Mr. Boochever of counsel for the defendant, to produce

the telegram, and there was no showing made, or attempted to be made, that the telegram was not in the possession of the defendant, to contradict the positive testimony of the witness, Kenneth D. Lambert, that the telegram was last seen in the office files of the defendant company at Whittier. Therefore, the evidence of the contents was admissible, since the lack of ability to produce the best evidence, to-wit: the telegram itself, was clearly accounted for by the fact that the defendant itself had the original telegram and failed, neglected, and refused to furnish it upon demand having been made to produce it, which demand was made several days since the first evidence of Mr. Lambert went in (Tr. 223); therefore, the witness had a perfect right to testify to the contents thereof.

And, this is especially true since the same testimony, or practically the same had gone in without objections. (Tr. 223.)

We think this rule to be so well settled that we will quote only from 20 *Am. Jur.* 414:

> "414. *Telegrams*—Where an issue involves facts stated in a telegram, under the best evidence rule the original telegram, if available, should be produced as proof of the contents of the message; secondary evidence of such contents is admissible only when the original telegram cannot be produced."

However, there was no objection made by defendant that is sufficient to raise this question on, and since it was not timely and properly raised in the trial Court, it should not be considered here.

VII.

IN ANSWER TO ASSIGNMENT OF ERROR SEVEN, AS FOLLOWS: THE COURT ERRED IN ALLOWING APPELLEES FURTHER TO AMEND THEIR AMENDED COMPLAINT AFTER APPELLEES HAD RESTED SINCE THE SECOND AMENDED COMPLAINT WAS BASED ON A SUBSTANTIALLY CHANGED CAUSE OF ACTION.

The amended complaint as shown (Tr. 2), is in two causes of action. While the second cause of action is shown in the printed transcript, in truth and in fact, the Court made an order striking plaintiffs' second cause of action, on a motion filed by the defendant. An exception was taken by the plaintiffs to the ruling of the Court, and the case went to trial with only the first cause of action and the third cause of action. The first cause of action being based upon an oral contract for the sale and purchase of the plaintiffs' property for $25,000.00, which in our humble opinion, was sufficiently proved in the trial of the case. The third cause of action in the trial Court's opinion, was not quite as it should be as a *quantum valebant* cause of action, and therefore, ordered the plaintiffs to file a second amended complaint which is found at page 12 of transcript, and is purely *quantum valebant.* It should be noted that the second amended complaint merely follows the proof that was put in without objections. These values were established by Lambert in practically every instance, and I think in all but the sawmill, which he declined to fix the value of, however, the value of the sawmill was fixed by several witnesses, including at least one of the defendant's witnesses, and the amended complaint was permitted to be filed to conform clearly to the evidence that went

in without objections. Plaintiffs' third cause of action in the original complaint was, in our humble opinion, sufficient as a *quantum meruit,* or *quantum valebant* allegation. It alleged that the defendant became indebted to the plaintiffs, became obligated and bound to pay them on or before the 10th day of April 1948, the sum of $25,000.00 on account of logging equipment, machinery, buildings, and rights to plaintiffs' timber permit, sold and delivered to the defendant by the plaintiffs at the defendant's request in the Third Judicial Division of the Territory of Alaska; which property the defendant accepted and now retains, and has failed, neglected, and refused to pay for the same, or any part thereof; that there is now due the plaintiffs from the defendant, the sum of $25,000.00, together with interest thereon at the rate of six per cent (6%) per annum from the 10th day of April, 1948.

However, we believe the trial Court, by allowing and directing the filing of the second amended complaint was absolutely correct, in that there was not a specific allegation in the third cause of action in the amended complaint as to the actual value of separate items and articles sold and delivered by the plaintiffs to the defendant, there being just a general inference as to the value of the property based upon the allegation of sale and delivery and an obligation to pay $25,000.00 Especially is this true, since the rules of Civil Procedure, and particularly Rule 15, subdivisions b and c, thereof would not only authorize and empower the Trial Judge to allow the trial amendments as made here, but seem to urge upon him

the necessity of allowing them. Subparagraphs b and c of Rule 15, are as follows:

"(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. *Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.* If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence." (Emphasis ours.)

"(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Unquestionably, the rule in all Federal Courts at the time of the trial of this case permitted amendments to the pleadings whenever justice would be better served, and the Trial Judge, sitting in the case at bar had

heard all of this evidence as to the values of each of the articles sold and delivered, and all of this evidence went in without objections, both plaintiffs and the defendant laboring under the conclusion that the evidence was correct and proper and was purely within the pleadings in the case.

The men of wisdom in adopting the rules of Federal Procedure were driving hard toward the point of eliminating technicalities of old, and arriving at a set of rules and procedure where justice could be speedily done and when they established Rule 61, "Harmless Error", they had in mind such matters as have been raised by counsel for appellant in this case. We take the privilege of quoting Rule 61 in our brief, as follows:

> "Rule 61. *Harmless Error.*
>
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every state of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

It is too apparent for need of discussion, that the first cause of action set up in the amended complaint was based upon contract of sale for a specific price, and we believe that at the close of plaintiffs' testi-

mony, that we had proved cause of action number one sufficiently to go to the jury on it; however, the Trial Judge, in his wisdom, thought that it was necessary to proceed on a *quantum valebant* theory as the evidence established *quantum valebant,* or *quantum meruit,* sufficiently and did allow and direct the filing of an amended complaint. It should be borne in mind that the third cause of action set up in the amended complaint as it originally stood was based upon a sale and a delivery and might have been sufficient as it was, but due to the ruling of the Court, the second amended complaint was filed to make the pleading comply with the evidence that was then in, and had been introduced without objection, and the values of the articles were testified to by both plaintiffs and defendant, both on direct and cross-examination, therefore, the trial Court, was unquestionably correct in allowing and directing the filing of the second amended complaint.

VIII.

IN ANSWER TO THE EIGHTH ASSIGNMENT OF ERROR, WHICH IS SET UP BY APPELLANT, AS FOLLOWS: THE COURT ERRED IN DENYING APPELLANT'S MOTIONS TO STRIKE PORTIONS OF APPELLEES' SECOND AMENDED COMPLAINT AND MAKE MORE DEFINITE AND CERTAIN, AND TO STRIKE PORTIONS OF APPELLEES' REPLY, SINCE IMPROPER ALLEGATIONS HIGHLY PREJUDICIAL TO APPELLANT, WERE PERMITTED TO GO TO THE JURY BY VIRTUE OF THE COURT'S DENYING THESE MOTIONS.

We think it is sufficient to call the Court's attention to the fact that a long motion to make more definite and to strike filed by the defendant was never

presented to the Court and we call your attention specifically to the long-drawn-out answer and counter-claim filed by the defendant to the second amended complaint, commencing on page 18 of the transcript, and extending over to page 37, and the matters referred to in the plaintiffs' reply to this monstrosity, were the portions attacked by the motion, but we have carefully examined the record, and find that the docket is quite clear on the fact that the trial of this case started May 31, 1949, and on June 2, the defendant filed a motion to strike directed against the second amended complaint, which had been filed earlier on the same day, see date of filing (Tr. 16), and on the same day filed an answer and counter-claim, see filing date (Tr. 37), then on June 3, plaintiffs filed their reply; and on June 4, defendant filed a motion to strike portions of the reply, and the case continued on trial until June 8, 1949, at which time the verdict was rendered for the plaintiffs, and at no time in the docket is there the slightest indication that the defendant ever asked the Court to rule upon its motion to strike, but was apparently happy with events as they transpired. Therefore, it would be grossly unfair to ask this Appellate Court to pass, for the first time, on the defendant's motion to strike portions of the reply, when they should have been presented to the trial Court, if the defendant had any confidence in said motion, or felt that any prejudicial results might happen, or that its motion should be sustained. Then it should have called said motion for hearing before the trial Court. Appellees relying upon former decisions of this Court, will not, unless requested, by this

Court, further argue the justice of the motion to strike referred to in the eighth assignment of error, since the motion was never presented to the trial Court and was waived by the defendant, and should not be considered for the first time, on appeal.

CONCLUSION.

In conclusion, please permit us to humbly state, that due to the conduct of the defendant company, and especially due to the fact that it received more than dollar for dollar in actual value under the terms of its purchase, that this appeal is not taken in good faith, but is apparently for the purpose of further harassing and annoying this pair of old gentlemen, who are now traveling on the downward slope of life, and who have lost, so far as the evidence shows, their life savings to the Columbia Lumber Company, and were only able to induce a jury to render a judgment for them for a little more than half the actual value of the benefits taken by the defendant. And, in this conclusion, permit me to quote the Alaskan statute which authorizes and empowers the judge of the District Court to allow and assess in favor of the prevailing party, a reasonable attorney's fee, which statute is as follows:

> "55-11-51. *Compensation of Attorneys.* The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in main-

taining the action or defense thereto, which allowances are termed costs. (C.L.A. 1913, p. 1341; C.L.A. 1933, p. 4061.)"

75 Fed. (2d) 692 holds:

"what is a reasonable attorney's fee, is not a question for the jury, no evidence thereon is necessary". *Forno v. Coil,* C.C.A. 9, 1935, 75 Fed. (2d) 692, and later in the case of *Pilgrim v. Grant,* 9 Alaska 417.

We feel that the small fee of $250.00 allowed to the plaintiffs by the Trial Judge, should be raised to a sum commensurate with the many, many days of labor performed by plaintiffs' attorneys in this case, both in the trial Court and on this appeal.

We also feel that the trial Court was duty bound to allow plaintiffs interest on the amount found due by the Court wherein he deleted the interest. (Tr. 98.)

This was all raised on the cross-appeal of the appellees and is properly before the Court for consideration.

Dated, Anchorage, Alaska,
May 3, 1950.

Respectfully submitted,
BAILEY E. BELL,
HERMAN H. ROSS,
Attorneys for Appellees and Cross-Appellants, Bruno Agostino and Stanley Socha.